

Resolution No.: 16-768
Introduced: November 18, 2008
Adopted: November 18, 2008

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION
OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT
IN MONTGOMERY COUNTY**

By: County Council

SUBJECT: APPLICATION NO. G-861 FOR AMENDMENT TO THE ZONING ORDINANCE MAP, Cindy Bar, Attorney for Applicant Keating Development Company, OPINION AND RESOLUTION ON APPLICATION.

Tax Account Nos. 00435988, 00435955, 00435990

OPINION

Application No. G-861, filed on November 15, 2006 by Applicant Keating Development Company, requests reclassification from the C-4 Zone (limited commercial) to the PD-44 Zone (Planned Development, 44 dwelling units per acre) of 2.5 acres of land located at 7001 Arlington Road, Bethesda, Maryland, in the 7th election district. The property is identified as Parcels N826, P828 and P795 on Tax Map HN122. As required under the PD Zone, the application was accompanied by a Development Plan with detailed specifications related to land use, density, development standards and staging. Pursuant to Code § 59-D-1.11, development under the PD Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the PD Zone.

After an initial review and public hearing, the District Council voted on March 29, 2007 to remand the present application to the Hearing Examiner with the following instructions:

to reopen the record, to provide the Applicant with the opportunity to revise its plans to better accommodate the recommendations of the Sector Plan and compatibility with the Capital Crescent Trail and the adjoining residential neighborhood, to provide more specific evidence regarding how the proposed traffic signal would affect conditions on this stretch of Arlington Road, particularly on Saturdays and Sundays, and to provide evidence as to whether the owner of the Bradley Shopping Center would be willing to cooperate in obtaining approval for and installing a traffic signal. On remand, the Hearing

Clerk's Note: Typographical error corrected on page 4 to read, "The maximum building height along Arlington Road would be 59.9 feet."

Examiner shall also further consider the question raised by the People's Counsel as to whether Section 59-C-7.15(b) requires a 100-foot setback from the rear property line abutting the Capital Crescent Trail.

Resolution No. 16-431.

The Hearing Examiner reopened the record to receive revised plans and other evidence, and conducted an additional public hearing. The Hearing Examiner now recommends approval of the proposed rezoning on grounds that the proposed development would be in substantial compliance with the applicable sector plan, would comply with the purposes, standards and regulations of the PD-44 Zone, would provide for a form of development that will be compatible with existing and planned land uses in the surrounding area, and would serve the public interest.

The Montgomery County Planning Board (the "Planning Board") and its Technical Staff recommended approval of the subject application in its original form. The Planning Board's transmittal letter included a recommendation from the Planning Board Chair that because of "the potential conflicts in traffic and vehicular movement for this project" on Arlington Road, the District Council should view the development plan "as illustrative rather than binding, so that the potential vehicular movement related issues can be thoroughly examined and resolved at site plan." Ex. 39 at 2. The District Council finds it impossible to follow this recommendation, because doing so would leave an inadequate basis for the District Council to make the findings required of it under Section 59-D-1.61 of the Zoning Ordinance.

The Planning Board did not review the application after the remand, but its Technical Staff reaffirmed its recommendation of approval after reviewing the revised plans, finding that compatibility has been improved. The District Council agrees with the recommendations to approve the application as now presented, and incorporates herein the Hearing Examiner's Report and Recommendation dated October 13, 2008.

The subject property consists of approximately 2.5 acres of land located at 7001 Arlington Road, Bethesda, in a C-4 Zone, between Bethesda Avenue to the north and Bradley Boulevard to the south. The site is roughly a parallelogram in shape, with about 277 feet of frontage on

Arlington Road, and approximate depths of 487 feet along its northern property line and 423 feet along its southern property line. The site is nearly entirely paved, and is developed with a United States Postal Service ("Postal Service") facility, a large parking lot and an entrance driveway. The elevation rises about ten feet from the southwest corner of the site to the northeast corner. Vegetation is limited to a small lawn area with ornamental trees on the west side of the building, and several areas on the north and east sides of the parking lot with scrub vegetation. The site has no forest, streams, wetlands or specimen and significant trees.

The surrounding area for this application consists of the area roughly bounded by Hampden Lane to the North, Woodmont Avenue and the Sacks residential neighborhood to the east, Bradley Boulevard to the south and Fairfax Road/Clarendon Road to the west.

The surrounding area is predominantly commercial in nature, containing a mix of uses. To the north and south, the subject property abuts commercial properties in the C-2 Zone: a tire store and an auto dealership to the north, and to the south an office/retail complex with a one-story building and a five-story parking garage closest to the subject site, plus two five-story buildings. Farther north are additional retail and mixed-use developments along Bethesda Avenue and Elm Street.

To the east, the subject property abuts the Capital Crescent Trail (the "Trail"), a 90-foot-wide public right-of-way containing a paved walking/biking trail, which Technical Staff describes as "a much used and cherished recreational amenity." In the vicinity of the subject site, the Trail consists of a 10-foot-wide asphalt path and a three-foot-wide, parallel, stone edge path, as well as a landscaped seating area with benches and a water fountain. On the east side of the Trail is a community of single-family, detached homes known as the Sacks neighborhood, classified under the R-60 Zone. Roughly 600 feet east of the subject site is the boundary of the Bethesda Central Business District, and the Bethesda Metro Station is about 1,800 feet from the site.

To the west of the site, across Arlington Road, is the Bradley Shopping Center in the C-2 Zone, which contains a variety of retail establishments including a hardware store, a variety store, a drug store and a delicatessen. Diagonally to the northwest is the Euro Motorcars car dealership, and

beyond it to the north is additional retail. Farther west along, Clarendon Road, is a row of multi-family and other residential uses.

The subject property was classified under the I-2 Zone (Heavy Industrial) in the 1958 County-wide comprehensive rezoning. The record does not reflect precisely when the property was rezoned to the C-2 Zone, but the C-2 zoning was confirmed by Sectional Map Amendment in 1972 (SMA F-736) and 1994 (SMA G-711).

The Applicant proposes to redevelop the subject site with a mix of uses in a single building: an expanded Postal Service facility on the ground level, four stories of multi-family residential dwellings above it, and two levels of underground parking. The new postal facility would have 7,000 square feet of retail space fronting on Arlington Road (a substantial increase over the current 1,000-square-foot retail space) and 23,000 square feet of Postal Service work space. The residential component would have a maximum of 105 multi-family units, including 12.5 percent Moderately Priced Dwelling Units ("MPDUs"). The maximum building height along Arlington Road would be 59.9 feet. The front of the building is shown at the edge of a wide, pedestrian-friendly, urban sidewalk. The Postal Service work space, parking and loading area would all be underground, beneath the residential units, and therefore the associated trips and activity levels would not be visible to site residents, Trail users or residents of the Sacks neighborhood. Testimony indicates that construction materials and methods would be used to buffer building residents from noise and vibrations from USPS truck traffic. The exterior wall of the garage would extend nearly to the Trail property line but would be almost fully underground. The visible floors of the building would be set back 60 feet from the Trail, creating a significant area for landscaped open space bordering the Trail.

The first-story Postal Service facility would serve as a platform for the four-story residential portion of the building and extensive terraces. The residential portion of the building would cover a roughly Z-shaped portion of the postal facility roof, with two short wings parallel to Arlington Road and the Trail, and a longer wing connected on the diagonal. The rest of the postal facility roof would be covered by landscaped terraces intended to comply with the PD Zone requirement that 50

percent of the site be occupied by green area. The terraces would be common space for building residents, and would be accessible from the first floor of the residential building. Staircases would provide access for building residents from the terraces to the residential lobby, the street and the Trail, although these access points would be closed to the public. The main entrance to the residential portion of the building would be at ground level, at the southern end of the site's Arlington Road frontage.

The walls of the four residential stories are specified to be 60 feet from the property line, not counting patios or terraces. Within that 60-foot open space, about the first 20 feet from the residential stories would be patios or terraces and a six to eight-foot walkway. The next 40 feet or so would slope down from the terraces to the Trail, and would be covered with soil and plantings. The immediate view from the Trail would be a sloping, landscaped area extending 60 feet back from the Trail, bordered by a very low wall along most of the property line, potentially with a four foot, non-opaque fence on top of the wall. Beyond the sloping area would be terraces or patios at an elevation approximately eight feet above the Trail, and 20 feet farther back, the four-story residential building. The building would have no shadow impact on the Trail, even during the time of its longest shadow, at the winter solstice.

Staff in the Park Development Division at MNCPPC recommended that if the development goes forward, this area "should not appear as the back of the 7001 Arlington Road development, but instead be carefully designed by a landscape architect as a public amenity for the thousands of users of the Capital Crescent Trail." The Development Plan indicates an intention on the Applicant's part to comply with this recommendation, with the details to be worked out during site plan review.

One of the most significant issues in this case has been the circulation plan, which needs to accommodate four traffic flows on a busy street: post office customers, Postal Service trucks of various sizes, Postal Service employees' private vehicles and building residents. The Applicant proposes to designate the existing driveway entrance, at the north end of the site's Arlington Road

frontage, for Postal Service vehicles and post office customers, who would park in separate areas on the upper level of the parking garage. Postal customers would park near the front of the site, essentially at the same grade as Arlington Road, and the parking would move below grade farther back (east) on the site. The retail post office would be at ground level, accessible on foot from Arlington Road or underground from the customer parking area.

The Applicant proposes a second driveway entrance at the south end of the site's Arlington Road frontage, to be designated for building residents and Postal Service employees. This entrance is shown with special paving and a circular drop-off area, in addition to the garage entrance. Residents and employees would park in separate areas on the lower level of the parking structure.

Pursuant to Code § 59-D-1.11, development under the PD Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the PD Zone. This development plan must contain several elements, including a land use plan showing site access, proposed buildings and structures, a preliminary classification of dwelling units by type and number of bedrooms, parking areas, land to be dedicated to public use, and land intended for common or quasi-public use but not intended to be in public ownership. Code §59-D-1.3. Once approved by the District Council, the development plan is binding on the Applicant except where particular elements are identified as illustrative or conceptual. The project is subject to site plan review by the Planning Board, and minor changes to the plan may be made at that time. The principal specifications on the development Plan – those that the District Council considers in evaluating compatibility and compliance with the zone, for example – may not be changed without further application to the Council to amend the development plan.

The principal component of the development plan in this case is a document entitled Development Plan, Exhibit 122(e). Additional elements of the Development Plan include aerial photographs (Exs. 50, 53 and 56), a zoning map indicating the relationship between the subject site and neighboring zoning and land uses (Ex. 8), a surrounding area map (Ex. 15) and a Natural Resources Inventory/Forest Stand Delineation ("NRI/FSD," Ex. 11).

Exhibit 122(e), satisfies the requirements of Section 59-D-1.3 by showing the approximate location proposed for the building, parking areas and access points. It specifies several textual binding elements, which are items the Applicant wished to make definite, but were more readily expressed in text than in the graphics. These are set forth below:

Textual Binding Elements from Development Plan, Ex. 122(e)

TEXTUAL BINDING ELEMENTS:

1. THE BUILDING WILL HAVE A MAXIMUM HEIGHT OF 59.9', AS MEASURED FROM THE BUILDING HEIGHT MEASURE POINT IN THE CENTERLINE OF ARLINGTON ROAD, WHOSE ELEVATION IS 306.64, AS SHOWN ON THE DEVELOPMENT PLAN.
2. THE DEVELOPMENT WILL HAVE A MAXIMUM DENSITY OF 1.66 FAR.
3. THE MAXIMUM NUMBER OF MULTI-FAMILY DWELLING UNITS TO BE CONTAINED IN THE BUILDING SHALL NOT EXCEED 105.
4. THE BUILDING SHALL INCLUDE 12.5% OF THE FINAL PERMITTED UNIT COUNT AS MODERATELY PRICED DWELLING UNITS.
5. THE DEVELOPMENT WILL PROVIDE A MINIMUM OF 50% GREEN AREA ON SITE.
6. AS PART OF THE SITE PLAN PROCESS FOR THE 7001 ARLINGTON ROAD PROJECT, THE SIGNALIZATION PROPOSED IN THE DEVELOPMENT PLAN MUST BE APPROVED BY DPWT, INCLUDING LANE GEOMETRY AND THE PROVISION OF NECESSARY RIGHTS OF WAY OR EASEMENT ASSURANCES ON THE WEST SIDE OF ARLINGTON ROAD. PRIOR TO APPLICATION FOR THE BUILDING PERMIT FOR CONSTRUCTION OF THE BUILDING THE FINAL DESIGN FOR THE SIGNAL MUST BE APPROVED, PRIOR TO ISSUANCE OF THE BUILDING PERMIT THE SIGNAL MUST BE PERMITTED AND BONDED, AND PRIOR TO THE ISSUANCE OF OCCUPANCY PERMITS THE SIGNAL MUST BE OPERATIONAL.
7. THE RESIDENTIAL BUILDING WALLS, EXCLUSIVE OF ROOF OVERHANGS, CORNICES, BALCONIES, PATIOS, TERRACES, UNDERGROUND PARKING GARAGES, GARAGE STAIR ACCESS WAYS, AND SIMILAR APPURTENANCES, WILL HAVE A MINIMUM 60 FOOT SETBACK FROM THE EASTERN PROPERTY LINE.
8. ACCESS FROM THE SUBJECT SITE TO THE CAPITAL CRESCENT TRAIL WILL BE PROVIDED FOR RESIDENTS OF THE PROJECT VIA WALKWAYS FROM THE BUILDING TO THE CAPITAL CRESCENT TRAIL ACCESS POINT.
9. ANY FENCING ALONG THE EASTERN PROPERTY LINE WILL NOT BE SOLID IN ORDER TO ALLOW VIEWS FROM THE CAPITAL CRESCENT TRAIL TO THE SUBJECT SITE.

The District Council finds that the Development Plan submitted with this application satisfies all the requirements for a development plan under Code §59-D-1.61(a)-(e), as discussed below.

§59-D-1.61(a): consistency with use and density indicated in the sector plan. The District Council finds the proposed development consistent with the Sector Plan's suggestion that one acceptable use for this site would be a combination of multi-family dwellings and neighborhood-serving retail. While dissenting views were expressed on this point during the hearing, the District Council agrees with the Hearing Examiner's conclusion that the retail post office portion of the proposed

development can be considered neighborhood-serving retail, and that the Sector Plan's concern that the post office facility would not be compatible with an on-site residential use did not foresee that residential dwellings could be protected from the noise and bustle of Postal Service operations by being located above the postal facility, with a total separation between the two.

While mixed-use development certainly existed when the Sector Plan was adopted, the evidence is undisputed that such development is more prominent today. Moreover, as Technical Staff suggested, the combinations of uses considered compatible have greatly expanded over time, particularly in rapidly urbanizing areas such as downtown Bethesda. Under these circumstances, hewing to the Sector Plan's specific finding that this post office could not be compatibly combined on the same site with residential use, and its recommendation for separate uses in separate buildings, would serve no purpose.

The Sector Plan recommended the same residential density proposed here, a maximum of 105 dwelling units. The Sector Plan suggested that under a mixed-use residential/commercial scenario, an appropriate combination would be 105 dwelling units plus 40,000 square feet of commercial space. The Applicant proposes that number of dwellings units plus 30,000 square feet of Postal Service space, 25 percent less than recommended. Technical Staff does not object to the decrease in commercial square footage, noting that as a master plan ages, its specific recommendations should be given less weight in favor of its more general intent. It appears that the Postal Service's ceiling requirement and extensive parking needs result in a building that is significantly larger than would normally result from the commercial density that was recommended in the Sector Plan. However, with the changes made on remand, the District Council finds that the density requested can be accommodated compatibly on the site.

Section 59-D-1.61(a) requires a finding by the Alternative Review Committee before a zoning application can be approved with a height or density exceeding applicable master plan recommendations, if the excess height or density is needed to accommodate MPDUs. Here, the Applicant proposes a building height and density that exceed the recommendations of the Sector Plan,

but the basis for this request is to accommodate the needs of the Postal Service, not MPDUs. The District Council agrees with the Hearing Examiner and Technical Staff that Alternative Review Committee consideration was not required in this case.

The evidence supports the conclusion that the Development Plan does not conflict with any other county plans or policies, or the capital improvement program. It would further county housing policy by creating additional housing options near the Bethesda Metro, including about thirteen MPDUs, and would be consistent with the applicable Growth Policy.

§59-D-1.61(b): purposes of the zone; safety, convenience and amenity of residents; and compatibility with adjacent development.

1. The Purpose Clause

The purpose clause for the PD Zone contains a number of goals and objectives, all of which are satisfied by this application. The District Council's findings as to each paragraph of the purpose clause are set forth below.

First paragraph: Master Plan implementation. The first paragraph of the purpose clause establishes consistency with the master plan as an important factor in applying the zone. As discussed under 59-D-1.61(a) above, the proposed development would be in substantial compliance with the use and density recommended in the Master Plan. The proposal also substantially complies with the general character of development recommended in the Sector Plan, for the reasons stated below.

The Sector Plan's urban design guidelines recommended that if the site were redeveloped for housing, building heights should be "four stories stepping down to three stories along the east side of the site to ensure compatibility with the Sacks single-family neighborhood." Sector Plan at 137. The building proposed here would depart from this recommendation, as it would effectively have six stories along Arlington Road (four stories of multi-family housing on top of an 18-foot postal facility, with a maximum height of 63 feet) and four and a half stories along the Trail (four stories of multi-family housing starting roughly eight feet above the grade of the Trail). Technical Staff and the Applicant's land planner and architect all found that the proposed building, with the residential stories

set back 60 feet from the property line, would have lesser impacts on the Trail and the Sacks neighborhood than a lower building set closer to the property line. The District Council agrees with these findings and concludes that as a result, the purpose of this recommendation would be satisfied.

The Sector Plan's urban design guidelines also called for street-front, neighborhood-serving retail uses along Arlington Road, sitting right on the sidewalk, and improved pedestrian circulation. The development proposed here would clearly accomplish these goals for the subject site.

The Applicant and Technical Staff suggest that the proposed development should be permitted because there are five-story buildings immediately north and south of this site that sit closer to the Trail than the building shown on the Development Plan. The original Hearing Examiner's report and recommendation in this case noted an alternative argument from a community member, who stated that the presence of five-story structures on either side of this site makes it all the more valuable to have a smaller building and deeper setback on the subject site, to let some sunshine in. By lowering the building and moving it farther back from the Trail, the Applicant has created exactly that effect – letting some sunshine and greenery in along a very urban part of the Trail.

Another contested issue is whether the Sector Plan's recommendation for Trail access from the subject site should be for site residents or the general public. The District Council is persuaded that the Sector Plan sought access for site residents only. The Sector Plan recommends, in the same sentence, vehicular access to Arlington Road from the southwest corner of the site, and pedestrian and bicycle access to the Trail on the east. This language focuses on access for site residents, both vehicular and pedestrian/bicycle. Moreover, the Sector Plan's suggested layout for this site shows an arrow from the site to the Trail, pointing only in one direction. As suggested by the Applicant's land planner, the Sector Plan likely would have shown a two-way arrow if the plan proposed public access from the Trail to the subject site. Technical Staff's support for residents-only Trail access lends additional credence to this conclusion, as does the Applicant's concern that public access through the site would present security concerns.

The Sector Plan recommended a mixed-use redevelopment of the subject site with neighborhood-serving retail and multi-family development, a pedestrian-oriented street front, a building height and setback that would be compatible with the Trail and the Sacks neighborhood, access to the Trail for residents, a new access point at the southwest corner of the site and attractive landscaping along the Trail. The development proposed here would be consistent with these recommendations, and would also provide funding for a mid-block traffic light recommended in the plan. In the District Council's view, the failure to satisfy some of the specific recommendations for the site does not undermine the project's substantial compliance with the Sector Plan's essential elements.

Second paragraph: social and community interaction, distinctive visual character, balanced mixture of uses. The proposed development would encourage social and community interaction by creating a large, common terrace area where building residents would have the opportunity to come together. The Development Plan also provides for access from the site to the Trail and the many amenities of downtown Bethesda, which would provide opportunities for site residents to interact with other community members taking part in downtown activities or using the Trail. The storefront post office and second-story terraces would give the building a distinctive visual character, and the continued post office function with new residential units would add to the diverse blend of residential, commercial, private and public uses in Bethesda.

Third paragraph: broad range of housing types. This development would increase the stock of multi-family housing available in downtown Bethesda and create a new housing option on Arlington Road.

Fourth and fifth paragraphs: trees, grading and open space. The subject site is virtually bereft of trees or other vegetation. The proposed Development Plan would create a sizeable green buffer along a very urban stretch of the Trail. It would also have a large, outdoor terrace at the second floor level that would be a significant green amenity for building residents. The language encouraging open space that benefits the community at large applies more readily to large sites, where significant open spaces may be available as quasi-public areas, than to a small, infill site such as the one at issue

here, where shared public space is less practical. In this case, the large, second-floor terrace would be a visual amenity for people on the upper floors of nearby office buildings, expanding the green space in their view shed considerably, and the 60-foot landscaped area on the ground would be a visual amenity for Trail users. The District Council considers these features sufficient to satisfy this element of the purpose clause.

Sixth paragraph: pedestrian networks. This paragraph also applies more readily to a large site with multiple buildings. Nonetheless, the Development Plan here provides pedestrian and vehicular linkages from Arlington Road to the post office and the main residential entrance, as well as pathways linking the residences to the large, landscaped terrace, Arlington Road and the Capital Crescent Trail. All of this, as well as the site's location in downtown Bethesda, near countless shops, restaurants and other activities accessible within a short walk, would encourage pedestrian activity. The Development Plan would further encourage pedestrian activity by improving the sidewalk along the site frontage, improving pedestrian access to the post office and installing a traffic light that would give pedestrians crossing Arlington Road a better sense of security. The traffic light could even be a deciding factor for some people as to whether they drive from the post office to the Bradley Shopping Center, or leave their cars in place and walk the short distance across the street. The People's Counsel suggested that allowing public access to the Trail through the subject site is necessary to comply with this element of the purpose clause. The District Council agrees with Technical Staff, however, that a pedestrian/bicycle connection to the Trail for site residents would be a significant pedestrian linkage, as would the proposed traffic light. Moreover, it would be difficult to reconcile public access through this site with the eighth paragraph of the purpose clause, which calls for, among other things, "a maximum of safety" for site residents.

Seventh paragraph: scale. The PD Zone encourages, but does not require, development on a large scale.

Eighth paragraph, first part: safety, convenience and amenity. The evidence demonstrates that the proposed development would provide a high degree of safety, convenience and

amenity for site residents, with a convenient downtown location, and on-site amenities including a landscaped terrace. It would also provide convenience and amenities for area residents generally, by greatly improving pedestrian and vehicular access to the post office; by replacing a view of a large surface parking lot from the Trail and nearby residences with a landscaped buffer area and a building that fits in with its surroundings; and by moving the noise and bustle of the post office underground, sheltering the Trail and the Sacks neighborhood from its impacts.

Eighth paragraph, second part: compatibility. The evidence supports a finding that the proposed development would be compatible with the surrounding area. The combination of uses would be compatible, with the retail post office complementing existing retail uses on Arlington Road, and the multi-family use acting, as suggested in the Sector Plan, as a good transition use between the Sacks neighborhood and the surrounding commercial center. Although residential use would not be in a separate building, it would still serve as a buffer because all of the commercial activity on site would be either on Arlington Road, away from the Sacks neighborhood, or underground. Only the residential activity would be visible or audible from the Sacks neighborhood.

The visual appearance of the subject site would be greatly improved by putting the large Postal Service parking and loading area underground. The density and resulting activity levels would be compatible with the mix of urban land uses in the surrounding area. The site design would also make the building and density compatible with the Trail and nearby homes. With a 60-foot setback for the residential stories and the underground stories more fully underground, the proposed building would be a compatible addition to the scenery bordering this section of the Trail. It would let in some sun, between two large structures that sit right on the Trail, and would provide a green buffer area with space for extensive plantings. The building height would be similar to some adjacent and nearby buildings, and the setback would prevent the building from looming over the Trail and residences. While the final decision on the traffic light will be made at a later stage, the preponderance of the evidence in this record supports a finding that the proposed development would not be incompatible due to adverse traffic impacts, but rather would bring improvements via the proposed traffic light.

Ninth paragraph: three findings. The purpose clause states that the PD Zone "is in the nature of a special exception," and shall be approved or disapproved based on three findings:

- (1) the application is or is not proper for the comprehensive and systematic development of the county;
- (2) the application is or is not capable of accomplishing the purposes of this zone; and
- (3) the application is or is not in substantial compliance with the duly approved and adopted general plan and master plans.

Based on the preponderance of the evidence and for the reasons stated above, the District Council concludes that present application is proper for the comprehensive and systematic development of the County and in substantial compliance with the Sector Plan, and would accomplish the purposes of the zone.

2. Standards and Regulations of the Zone

The standards and regulations of the PD-44 Zone are summarized below, together with the grounds for the District Council's conclusion that the proposed development would satisfy the applicable requirements.

Section 59-C-7.121, Master Plan Density. Pursuant to Code §59-C-7.121, "no land can be classified in the planned development zone unless such land is within an area for which there is an existing, duly adopted master plan which shows such land for a density of 2 dwelling units per acre or higher." The subject property is recommended in the Master Plan for residential development at a density of up to 44 units per acre, so this requirement is satisfied.

Section 59-C-7.122, Minimum Area. Code §59-C-7.122 specifies several criteria, any one of which may be satisfied to qualify land for reclassification to the PD Zone. The subject application satisfies the first of these criteria, which states the following:

That it contains sufficient gross area to construct 50 or more dwelling units under the density category to be granted.

The subject property contains sufficient gross area to permit the construction of 105 dwelling units.

Section 59-C-7.131, Residential Uses. All types of residential uses are permitted, but parameters are established for the unit mix. A PD-44 development with less than 200 units may, as proposed here, consist of 100 percent multi-family units.

Section 59-C-7.132, Commercial Uses. Commercial uses indicated on the applicable master plan are permitted in the PD Zone. The District Council will follow the Hearing Examiner, Technical Staff and the Applicant in addressing the proposed postal service facility as a commercial use, which is clearly considered appropriate in the Sector Plan as an existing, community-serving use.

Section 59-C-7.133, Other Uses. No uses are proposed other than the postal service facility and residential use.

Section 59-C-7.14, Density of Residential Development. The Zoning Ordinance provides the following direction for the District Council in considering a request for the PD Zone (§ 59-C-7.14(b)):

The District Council must determine whether the density category applied for is appropriate, taking into consideration and being guided by the general plan, the area master or sector plan, the capital improvements program, the purposes of the planned development zone, the requirement to provide [MPDUs], and such other information as may be relevant.

The Zoning Ordinance classifies the density category applied for, PD-44, as a high-density planned development zone, which may be appropriate in an urban area. It is, moreover, the density recommended for the subject site in the Sector Plan. For reasons discussed above with regard to compatibility, the District Council considers the PD-44 category appropriate for this site. The Development Plan proposes a maximum density of 38.9 dwelling units per acre, somewhat less than the maximum the zone would allow and in keeping with the Sector Plan's recommendation.

Section 59-C-7.15, Compatibility. This section requires that a proposed development be compatible internally and with adjacent uses. It also establishes minimum parameters for setbacks and building height that are designed to promote compatibility. As discussed above, the District Council finds that the proposed development would be compatible with existing development in the surrounding area and that the proposed combination of uses would be compatible. The specific setback and building height provisions are discussed below.

Section 59-C-7.15(b) reads as follows:

(b) In order to assist in accomplishing compatibility for sites that are not within, or in close proximity to a central business district or transit station development area, the following requirements apply where a planned development zone adjoins land for which the area master plan recommends a one-family detached zone:

(1) No building other than a one-family detached residence can be constructed within 100 feet of such adjoining land; and

(2) No building can be constructed to a height greater than its distance from such adjoining land.

The District Council agrees with the Hearing Examiner's conclusion that Section 59-C-7.15(b) does not apply to the subject site because by its terms, it is intended "to assist in accomplishing compatibility for sites that are not within, or in close proximity to a central business district" (emphasis added). The Applicant maintains that the subject property is in close proximity to the Bethesda CBD, as it sits within 600 feet of the CBD boundary. The People's Counsel argues that "close proximity" requires more than just "proximity," that word having been modified by "close," which implies nearness or adjacency. He finds it to be evident that the subject property is not within "close proximity" to the CBD. The Montgomery County Civic Federation similarly argues that in this context "close proximity" means "adjacent." See Ex. 99. Technical Staff finds that all properties within the Sector Plan area are either within or in close proximity to the CBD. The District Council finds that Technical Staff and the Applicant have the better argument. The language of Section 59-C-7.15(b) applies to all potential applications of the PD Zone, anywhere in the County. Viewed in the context of the County as a whole, a site that is a few hundred feet from a CBD can readily be considered in close proximity to it. This language is intended to distinguish areas that are quite close to a CBD, where residents should expect commercial uses nearby, from areas with no CBD in sight, where residents may expect a higher degree of privacy, quiet and residential setting. Accordingly, the District Council is persuaded that Section 59-C-7.15(b) does not apply to the subject site.

Section 59-C-7.16, Green Area. The PD-44 Zone requires a minimum of 50 percent green area. The Development Plan depicts green area satisfying this requirement, consisting of the second-

story terrace (about 60% of the green area), the sidewalk along Arlington Road (about 20%), and the buffer area along the Trail (about 20%). The Applicant argues, and Technical Staff agrees, that the second-floor terrace qualifies as "green area" even though it would sit on the roof of a building – the postal facility. The Montgomery County Civic Federation argues that "green area" should be located at ground level, rather than allowing the same piece of ground to qualify both as part of a building footprint and as "green area."

The Zoning Ordinance defines "green area" as follows:

Green area: An area of land associated with and located on the same tract of land as a major building or group of buildings, or a prescribed portion of the land area encompassed by a development plan, diagrammatic plan or site plan, to which it provides light and air, or scenic, recreational or similar amenities. This space must generally be available for entry and use by the occupants of the building or area involved, but may include a limited proportion of space so located and treated as to enhance the amenity of the development by providing landscaping features or screening for the benefit of the occupants or those in neighboring areas, or a general appearance of openness. Green area may include but is not limited to lawns, decorative plantings, sidewalks and walkways, active and passive recreational areas including children's playgrounds, public plazas, fountains, swimming pools, wooded areas, and watercourses. Green area does not include parking lots or vehicular surfaces, accessory buildings other than swimming pools, or areas of open space so located, small, or circumscribed by buildings, parking or drainage areas as to have no substantial value for the purposes stated in this paragraph.

The Planning Board and its staff, as well as the Applicant's land planner, interpret this definition to include areas on rooftops. Technical Staff explained that although the definition begins with "An area of land," it goes on to cite examples of what is and is not included in green area, and does not explicitly exclude rooftop terraces. Staff viewed the landscaped terrace in this case as providing benefits to site residents as well as neighboring areas, and considered it within the scope of the "green area" definition. Staff notes that the District Council approved a development plan amendment (DPA 06-1) on April 24, 2007 that provided for nearly half the green area on the penthouse level.

The Civic Federation added a new twist to its green area argument after the remand hearing. In a post-hearing submission, its representative, Jim Humphrey, maintained that about 5,000 square feet of the green area identified on the Development Plan, roughly nine percent of the total, would sit on top of the underground garage. In his view, green area in the PD Zone cannot be located

on top of an underground garage. Mr. Humphrey based this prong of his argument on two sections of the Zoning Ordinance that provide expressly, one for the CP Zone (commercial, office park) and one for the LSC Zone (Life Sciences Center), that areas above underground parking may be counted as green area. See Code Sections 59-C-4.338 and 59-C-5.473. As Mr. Humphrey correctly noted, Maryland's highest court has held that "where the legislature in a statute expressly authorizes a particular action under certain circumstances, the statute ordinarily should be construed as not allowing the action under other circumstances." *Mossburg v. Montgomery County*, 329 Md. 494, 505, 620 A.2d 1144 (Md. 2006). One could argue, by analogy, that the District Council's adoption of provisions in two zones that specifically permit the roofs of underground garages to be counted as green area implies that in all other zones, such rooftops may not be used for green area.

In response to this argument, counsel for the Applicant chose not to examine legislative history, case law, or any other potential legal support for a contrary position. Instead, she stated that the Hearing Examiner and the District Council previously found that green area can be located as proposed in this case, and that Mr. Humphrey's interpretation "would undermine the integrity of the entire Ordinance, and be completely inconsistent with the Planning Board and Council's application of the green space [sic] requirements in all other cases." See Ex. 128. The findings in the Hearing Examiner's earlier report and recommendation and in the Council Resolution were based on the information in the record at that time. New evidence requires a new assessment and fresh findings. Moreover, far from undermining the integrity of the entire Zoning Ordinance, Mr. Humphrey's interpretation would lead to a holistic view of the Ordinance, based on an assumption that when the District Council adopts a provision for one zone, it is aware of potential implications for other zones.

The two provisions Mr. Humphrey cites seem unnecessary, since the language of the green area definition, ambiguous though it is, seems clearly to allow virtually any at-grade, non-vehicular open space to be counted as green area. Thus, the two provisions Mr. Humphrey cites seem to merely reinforce a right that has already been granted. If they are to be interpreted as Mr. Humphrey

suggests, one would have to start with the premise that the definition of green area was somehow meant to exclude areas on top of underground garages.

Turning to legislative history to examine the intent behind the green area definition, the District Council notes that the definition has not been materially changed since its adoption in 1962. It was originally adopted in conjunction with creating a new zone for apartment buildings. See Ordinance No. 4-124, Feb. 13, 1962. The new zone was created in response to conditions at a number of apartment projects in the County, where “[p]oor site development and massive buildings with inadequate setbacks and distances between buildings have resulted in unnecessary destruction of topographic features, restricted light, traffic congestion, inadequate interior roadways of great problem to emergency vehicles and fire departments . . . and inadequate yard areas for recreation for apartment tenants.” See *id.* The Ordinance Opinion made the following observations with regard to the need for more green area:

Particularly important has been the lack of recreational ground area. Even where “green areas” were theoretically available by a paper analysis of building lot coverage in relation to recreation area and parking area, such “green areas” have so [sic] been sliced up and divided into small strips, spots and dots that they were unusable for the benefit and enjoyment of the apartment dwellers.

This zone, by requiring site review, a percentage of “green area”, as well as a maximum allowable percentage of building coverage, remedies these deficiencies to provide a safe, healthful environment for apartment dwellers.

This language suggests that in adopting the green area definition, the Council was attempting to solve a problem – inadequate outdoor recreational space for apartment dwellers. The references to “inadequate yard areas for recreation” and a lack of “recreational ground area” could be seen, particularly in combination with the phrase, “An area of land” at the beginning of the green area definition, to suggest that green area was expected to be on the ground. It appears that the Council assumed that green area would be on the ground, which was not surprising in the Montgomery County of 1962, where space was not yet tight enough for anyone to think of putting recreation areas on rooftops. It is not clear, however, that the Council intended to prohibit green area from being located on a roof, whether the roof of an underground parking garage or of a building. The fundamental intent

of the definition and the green area requirement was to provide useful outdoor recreation space for apartment dwellers, and that goal can be satisfied with a well-designed rooftop recreation area as well as on the ground.

The District Council finds sufficient support in the legislative history to conclude that permitting green area on top of a roof, whether an underground garage roof or a building roof, is consistent with the fundamental intent of the green area definition. Moreover, this interpretation has been applied consistently by the Planning Board, and the District Council accepted it in a recent rezoning case. It will be so applied again today.

Section 59-C-7.17, Dedication of Land for Public Use. This section requires that land necessary for public streets, parks, schools and other public uses must be dedicated to public use, with such dedications shown on all required development plans and site plans. The Development Plan shows the sole dedication, consisting of additional right-of-way along Arlington Road.

Section 59-C-7.18, Parking Facilities. Off-street parking must be provided in accordance with the requirements of Article 59-E of the Zoning Ordinance. The Development Plan in this case provides for more than the required number of spaces. Technical Staff confirms that the Zoning Ordinance requirement for parking would be met.

The final two elements of finding (b), the maximum safety, convenience and amenity of the residents, and compatibility, have already been addressed.

§59-D-1.61(c): safe, adequate and efficient internal vehicular and pedestrian circulation systems. Considerable anecdotal evidence was presented about traffic safety on this stretch of Arlington Road. Visibility from the many driveway openings on this part of the road is limited by a hill and a curve, particularly for the southern driveway proposed on the subject site and for the Bradley Shopping Center, both of which are directly on the curve. Hearing participants testified that the curve makes it difficult for drivers exiting the post office or the shopping center to see oncoming traffic. Opposition witnesses questioned whether the proposed development would improve traffic circulation

and pedestrian safety (one of the Sector Plan's objectives for the Arlington Road District) or would make a bad situation worse.

Technical Staff found that the driveway designs are adequate and that the separation of residential parking from post office customers and truck traffic is adequate and appropriate. As stated in a memorandum to the Hearing Examiner, Staff "could not find any reason to believe that the proposed design of the access points is inadequate or unsafe."

The Applicant's traffic planner testified that the new circulation pattern would be a big improvement over current conditions, where retail customers share the same driveway and parking areas with Postal Service trucks, Postal Service employees and loading docks used by large trucks. Under current conditions, moreover, customers arriving on foot must walk down the drive aisle and around the parking lot to reach the entrance to the retail post office. Under the proposed Development Plan, separate parking areas would be provided for each type of traffic, retail customers could reach the building without having to negotiate past trucks, and pedestrians would have direct access from Arlington Road. Building residents would also have the convenience of a circular drop-off area at the residential entrance, avoiding the need for vehicles to stop on Arlington Road to drop off or pick up a passenger.

The northern driveway would be slightly wider than the existing one, but in essentially the same location, about 50 feet from the driveway entrance for the tire store to the north. The Montgomery County Department of Transportation (referred to here by its acronym at the time of the hearing and written submissions, "DPWT") normally prefers a 100-foot driveway spacing, but has approved a driveway spacing exception to permit the new post office driveway in the same location.

The southern driveway would not provide adequate sight distance to the left for exiting vehicles, due to the curve in the road. To resolve this problem, the Applicant proposes to install a traffic signal, which would control the proposed southern entrance to the subject site and the main entrance to the Bradley Shopping Center. According to DPWT, as long as the new driveway has a "no right turn on red" designation, a traffic signal would make the normal sight distance requirement inapplicable.

Installing a traffic signal on Arlington Road would require approval from DPWT. Based on a traffic signal warrant study prepared by the Applicant, DPWT has agreed that weekend traffic at the Bradley Shopping Center meets the side street warrant criteria for a traffic signal. DPWT notes that other factors must be addressed before final approval for signalization can be given, requiring detailed engineering layout and signal design, as well as procurement of necessary rights of way or easements. These issues are normally addressed at the site plan/permit stage.

The Applicant has added a textual binding element to the Development Plan in response to language suggested by DPWT, with input from the principal hearing participants and the Hearing Examiner. It reads as follows:

6. AS PART OF THE SITE PLAN PROCESS FOR THE 7001 ARLINGTON ROAD PROJECT, THE SIGNALIZATION PROPOSED IN THE DEVELOPMENT PLAN MUST BE APPROVED BY DPWT, INCLUDING LANE GEOMETRY AND THE PROVISION OF NECESSARY RIGHTS OF WAY OR EASEMENT ASSURANCES ON THE WEST SIDE OF ARLINGTON ROAD. PRIOR TO APPLICATION FOR THE BUILDING PERMIT FOR CONSTRUCTION OF THE BUILDING THE FINAL DESIGN FOR THE SIGNAL MUST BE APPROVED, PRIOR TO ISSUANCE OF THE BUILDING PERMIT THE SIGNAL MUST BE PERMITTED AND BONDED, AND PRIOR TO THE ISSUANCE OF OCCUPANCY PERMITS THE SIGNAL MUST BE OPERATIONAL.

This binding element includes language (1) to place the onus on the Applicant not to apply for a building permit until the traffic signal has been approved; and (2) to ensure that the building will not be occupied and generating traffic until the signal is actually operational. This binding element provides a very strong assurance that if the zoning is approved, the building will not be constructed unless the traffic signal receives final approval from DPWT, and will not be occupied until the signal is in use. Any changes to those conditions would require a development plan amendment approved by the District Council.

The People's Counsel, Martin Klauber, questioned at the first hearing whether the proposed traffic signal would worsen traffic problems on Arlington Road, e.g. by causing additional back-ups during the weekday peak hours. The Applicant's principal traffic expert opined that the proposed traffic signal would improve traffic conditions along this stretch of Arlington Road by providing safe movements in and out of the shopping center and the new driveway on the subject site, and would

create gaps in traffic that would make queues more manageable. As several witnesses pointed out, moreover, a traffic signal at the proposed location was recommended in the Sector Plan.

Technical Staff assessed the potential impact of the traffic signal after the remand. Staff estimated that on average, the number of vehicles waiting at the proposed traffic light would be five southbound and four northbound. Staff found that there is more than enough space for that number of vehicles to line up at the light without blocking the closest driveways. Staff addressed the risk of drivers not seeing the traffic signal around the curve by stating that warning signs can be posted to warn motorists of a signal ahead. Staff noted that the proposed signal would have the benefits of safely permitting full movements from the existing shopping center driveway, and of providing a safe pedestrian crossing at this location. These findings were concurred in at the remand hearing by one of the Applicant's traffic experts. In the District Council's judgment, the expert testimony and opinions of Technical Staff outweigh mere allegations, without supporting factual evidence, that the traffic signal and the proposed access points would have unacceptable adverse impacts.

Mr. Klauber and Mr. Humphrey argued that the Applicant should not be permitted to rely on the proposed traffic signal because it is not "reasonably probable of fruition in the foreseeable future," a standard that is commonly applied in the Maryland courts. See *Montgomery County v. Greater Colesville Citizens Association*, 70 Md. App. 374 (1987). They considered it uncertain because there had been no comment on the traffic signal from the owner of the Bradley Shopping Center, and because of the need for later approval from DPWT. The owner of the shopping center has now indicated a willingness to cooperate with the installation of the traffic signal, although final approval still rests with DPWT.

The traffic signal is not a certainty, but in the District Council's estimation, the preponderance of the evidence indicates that it is reasonably probable of fruition in the foreseeable future. County planners have recommended it, DPWT has agreed that the traffic volumes warrant a signal, and the Applicant is prepared to pay the full cost. The binding element guarantees that if the rezoning is granted, the proposed building will not be constructed unless the traffic signal receives final

DPWT approval, nor will it be occupied unless the traffic signal is put into operation or the Applicant comes back to the District Council for a development plan amendment.

§59-D-1.61(d): preservation of natural features. The proposed development would tend to minimize grading by taking advantage of the site topography to put part of the building underground. The site is virtually bereft of trees or other natural features, and the minimal forest conservation requirement would be easily satisfied. The Applicant's engineer testified persuasively that quantity and quality stormwater management controls to be placed in the parking garage would satisfy applicable requirements and improve the present situation.

§59-D-1.61(e): common area maintenance. The Applicant has not provided any draft documents of this nature. However, the Applicant's hearing representative, Frank Poli, testified that if this development goes forward, the ultimate ownership configuration will ensure that landscaping is maintained on site in perpetuity. See Tr. Aug. 1 at 11.

In addition to the five development plan findings, the District Council also must consider the relationship of the present application to the public interest. When evaluating the public interest, the District Council normally considers master plan conformity, the recommendations of the Planning Board and Technical Staff, and any adverse impact on public facilities or the environment.

The Hearing Examiner, the Planning Board and Technical Staff concluded that the proposed development would substantially comply with the recommendations and objectives of the *Bethesda CBD Sector Plan*, and the District Council agrees.

The Applicant's submitted traffic study demonstrates that the proposed development would not cause critical lane volume ("CLV") at any of the studied intersections to exceed the congestion standard established for the relevant policy area. Technical Staff agreed with this conclusion, as did the Hearing Examiner, after weighing it against evidence submitted by community members concerning traffic back-ups on Arlington Road. The traffic study showed post-development CLVs well below the applicable congestion standard of 1,800 during the weekday peak periods, and

even on a busy Saturday. The preponderance of the evidence indicates that the accident rate involving pedestrians, a key concern expressed by community members, is fairly low for a busy street. Moreover, an informal application of the queuing analysis standards provided in the Local Area Transportation Review Guidelines suggests that the existing back-ups on Arlington Road are within norms that are considered acceptable in a central business district. Accordingly, the District Council concludes that the preponderance of the evidence indicates the proposed development would have no adverse effects on traffic conditions, in light of the Applicant's commitment not to even seek a building permit until the proposed mid-block traffic signal has received final approval from DPWT.

The evidence indicates that utilities are readily available, and that forest conservation and stormwater management regulations would be satisfied. With regard to public schools, the District Council finds that the expected minor addition to overcrowding at Bethesda Elementary School does not warrant denial of the requested rezoning.

The District Council notes that the proposed development would serve the public interest not only by promoting the essential goals of the Sector Plan, but by putting in place an improved post office, which serves an important public function.

For these reasons and because to approve the instant zoning application will aid in the accomplishment of a coordinated, comprehensive, adjusted, and systematic development of the Maryland-Washington Regional District, the application will be approved in the manner set forth below.


ACTION

The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District located in Montgomery County, Maryland approves the following resolution:

Zoning Application No. G-861, requesting reclassification from the C-4 Zone (limited commercial) to the PD-44 Zone (Planned Development, 44 dwelling units per acre) of 2.5 acres of land located at 7001 Arlington Road, Bethesda, Maryland, in the 7th Election District, is hereby approved in the amount requested, subject to the specifications and requirements of the final Development Plan

approved by the District Council, Exhibit 122(e), provided that, within 10 days of receipt of the District Council's approval resolution, the Applicant must submit to the Hearing Examiner for certification a reproducible original and three copies of the approved Development Plan.

This is a correct copy of Council action.

A handwritten signature in cursive script, reading "Linda M. Lauer".

Linda M. Lauer, Clerk of the Council